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Foreword

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Foreword

In the early 1960s the United States Supreme Court struck down a Connecticut law that made it a crime to use “any drug, medicinal article or instrument for the purpose of preventing conception.” Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, was arrested when the New Haven Planned Parenthood clinic provided contraceptive counseling and prescriptions. She was convicted and appealed, culminating in the landmark 1965 *Griswold v. Connecticut* decision. Writing for the majority, Justice Douglas concluded that a right to privacy, while not established by the text of the Bill of Rights, is found in the penumbra of other rights; concurring opinions relied also on the due process clause and the Ninth Amendment.

The fifty years since *Griswold v. Connecticut* have seen no abatement in the debate over the margins and underpinnings of this decision. This anniversary of the decision is a proper moment to revisit the debate, and separating heat from light, allowing us to reflect and discover some of the themes running through it. This is especially fruitful given how much has changed since the *Griswold* decision. New reproductive technologies have enabled us to create and define family in ways barely contemplated at that time. And new law in other areas of human rights and regulation of private sexuality has enriched the field in which *Griswold* sits.

At the same time, we find that the most fundamental issues underlying *Griswold* endure. As our panelists Cary Franklin and Kim Buchanan argued, high among those is the class-based nature of the debate. It was an open secret during the 1950s and 1960s in Connecticut as elsewhere that contraception was available to women who could afford a private doctor. It was only the actions of the Planned Parenthood clinic, making reproductive self-determination available to poor women, that prompted the criminal prosecution that was appealed to the Supreme Court. Then, as now, the debate over contraception, and more recently abortion, has as a practical matter centered over social control over the bodies of women of outclasses.

As Priscilla Smith argues in *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, many of the justifications for limiting women’s access to contraception, when examined, reveal an underlying motive of seeking to relegate women to traditional roles as mothers, and not necessarily at the times of their choosing. Smith finds that arguments presented amid concerns for physical health, when examined critically, are founded on a more basic discomfort over women’s ability to choose and enjoy sex for its own sake.

On a more general level, *Griswold* was one of a number of cases highlighting the persistent role of the state in regulating intimate conduct. As Melissa Murray points out in *Griswold's Criminal Law*, the *Griswold* decision follows a long line of cases, statutes, and scholarly and public debates over the use of the criminal law to control private behavior. In particular, one can find in these cases a theme of laws “protecting” women from the consequences of exercising their own liberty.

Apart from their examinations of the efforts to limit reproductive rights, our authors also provide a rigorous constitutional framework to support these elements of privacy in a sustainable fashion. Neil Siegel and Reva Siegel, in *Compelling Interests and Contraception*, analyze the state interests that could apply in cases like *Hobby Lobby* that present instances of social control over reproductive rights. As they point out, the caselaw on the compelling state interests that should protect these rights is inadequately developed, and as a result often inadequately weighed. They set out a theory of both community and personal interests that collectively justify the compelling state interest to be protected. There are community interests in equality, economic growth, and public health that call for protection of women’s right to control their own bodies. At the same time there are personal interests in dignity, self determination, and autonomy that are worthy of constitutional consideration. In combination these community and personal interests should be considered in assessing the importance of constitutional protection from state regulation of private conduct.

Together with our other speakers, Douglas NeJaime, Susan Schmeiser, Kim Buchanan, and Cary Franklin, these authors provide a powerful new perspective on the debate following *Griswold*. It is the duty of legal scholars to test and uncover the fundamental truths beneath our public debates and search for principles. There are few areas warranting such vigorous exploration as state control of personal conduct regarding sexuality. We thank these scholars for sharing their explorations with us at the University of Connecticut School of Law.

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